

October 14, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands* – WT Docket No. 03-66 –
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

As the Commission moves towards resolution of the petitions for reconsideration of the *Report and Order* in the above-referenced proceeding, one of the most debated issues involves the ability of operating multichannel video programming distributors (“MVPDs”) to opt-out of the transition to the new bandplan for the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”). I am writing on behalf of the Wireless Communications Association International, Inc. (“WCA”) to address recent filings by representatives of a handful of analog MVPD systems (the “Analog Systems”) that seek the absolute right to operate under the pre-transition rules in perpetuity.¹

The MVPD opt-out issue has its genesis in the initial filings by WCA, the National ITFS Association and the Catholic Television Network (collectively, the “Coalition”) that commenced this proceeding. There, the Coalition proposed that any MVPD that was utilizing more than seven channels for the transmission of digital video programming material or that had a penetration of at least 5% of the homes in its authorized service area as of October 7, 2002 and as of the time of transition would be permitted to opt-out of the transition. Although the Coalition’s proposal for an automatic opt-out garnered virtually unanimous support from those participating

¹ See Letter from Donald L. Herman, Jr. to Marlene H. Dortch, WT Docket No. 03-66 (filed Oct. 11, 2005); Letter from Stephen E. Coran and Donald L. Herman, Jr. to Marlene H. Dortch, WT Docket No. 03-66 (filed Oct. 6, 2005). WCA notes that the most recent proposal by the Analog Systems has eliminated their prior suggestion that even licensees who have no operating systems be permitted to automatically opt-out. Certainly, that is a step in the right direction although, as discussed herein, does not cure the problems associated with the Analog Systems’ proposal.

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in this proceeding, the *Report and Order* rejected the proposal and instead urged those who would have been eligible for an automatic opt-out to instead seek a waiver.² WCA has petitioned the Commission to eliminate the costs and regulatory uncertainty that a case-by-case waiver approach requires, and at a minimum provide an automatic opt-out to those systems that were utilizing more than seven channels for the distribution of digital multichannel video programming as of October 7, 2002 and as of the time of the transition.³ Because the new bandplan only provides for seven channels in the Middle Band Segment (“MBS”) -- the portion of the new bandplan designed to accommodate high-power, high-site video -- those systems that are utilizing more than seven channels for the distribution of digitized MVPD programming clearly cannot be accommodated under the post-transition bandplan and rules. Thus, an automatic opt-out for those digitized operations is justified.⁴

The recent filings by the Analog Systems urge the Commission to grant WCA’s petition for reconsideration. In addition, however, they urge the Commission to expand the relief requested by WCA such that an analog system that has its transmission facilities located in a rural county and meets certain minimal subscriber and channel benchmarks could automatically opt-out of the transition process in perpetuity. While WCA certainly appreciates the desire of the Analog Systems to continue their service offerings, WCA remains convinced that their cases are best considered in the context of individualized waiver requests where the Commission can weigh all of the facts, including the availability of alternatives that might mitigate interference to neighboring broadband operations.

Earlier in this proceeding, WCA presented the Commission with analyses showing the adverse impact that continued operation of analog video systems in Socorro, NM and Twin Falls, ID would have on cochannel cellularized broadband systems in Albuquerque, NM and Boise, ID, respectively.⁵ It is worth noting that in both of those cases the transmission facilities were

² See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Band*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14282-88 (2004)[“*R&O and FNPRM*”].

³ See WCA Petition at 26-30; Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66 (filed Oct. 6, 2005); Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66 (filed Sept. 30, 2005); Letter from Paul J. Sinderbrand to Marlene H. Dortch, WT Docket No. 03-66 (filed Sept. 26, 2005).

⁴ By contrast, of course, a system that is today using some or all of the 33 BRS and EBS channels for the distribution of analog video programming can be readily accommodated in the MBS. With compression rates averaging 8:1, the MBS can accommodate 56 channels of video programming, approximately double what the average analog MVPD offers today.

⁵ See Reply Comments of Wireless Communications Ass’n Int’l, National ITFS Ass’n and Catholic Television Network, WT Docket No. 03-66 at 48-51 (filed Oct. 23, 2003)(examining interference from Twin Falls, ID to wireless broadband system in Boise and from Clayton, OK to surrounding rural areas); Reply Comments of Wireless Communications Ass’n Int’l, National ITFS Ass’n and Catholic Television Network, RM-10586 at 31-33

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located in a rural county and thus would have met the threshold requirement under the latest proposal by the Analog Systems for an automatic opt-out. Certainly, WCA has no quarrel with granting waivers to analog systems that are located “in the middle of nowhere” and will not place a signal into the geographic service area of other licensees without their consent. In such cases, continued operation under the pre-transition bandplan and technical rules is benign. However, as the Socorro and Twin Falls examples illustrate, not all analog systems based in rural counties necessarily meet that criteria and adoption of the Analog Systems’ proposal for an automatic opt-out would permit analog systems to interfere with their neighbors. Such an automatic opt-out would be inappropriate give that there is an alternative “win-win” approach available.

In the *Further Notice of Proposed Rulemaking* in this proceeding, the Commission itself proposed a system under which an analog MVPD could elect to return its spectrum in the Lower Band Segment (“LBS”) and the Upper Band Segment (“UBS”) and retain just its spectrum in the MBS.⁶ In exchange, the costs of migrating its MVPD operations to the MBS, including the digitization of operations that today utilize analog technology, would be subject to reimbursement by the winner of the auction for the returned LBS/UBS spectrum.⁷ In WCA’s view, this proposal should be adopted by the Commission. Moreover, no opt-out by an analog system should be permitted (whether by waiver or by right) unless the analog system has offered to return its LBS and UBS spectrum for re-auction in exchange for financial support in digitizing. This approach is a classic “win, win” – the rural MVPD can continue offering its service *ad infinitum* using digitized MBS channels without incurring additional costs, while the risk of interference to broadband services operating in the LBS and UBS in neighboring areas is mitigated. Moreover, it promotes the migration of the BRS/EBS band to spectrally efficient digital technology. If an analog MVPD is unwilling to avail itself of this option, it should not be entitled to any automatic opt-out (should the Commission permit any analog systems to automatically opt-out of the transition process), and its unwillingness should be a significant demerit as the Commission weighs any waiver request.⁸

(filed Nov. 29, 2002)(examining interference from Madison, WI to wireless broadband systems in Milwaukee and Chicago and from Socorro, NM to wireless broadband system Albuquerque).

⁶ See *R&O and FNPRM*, 19 FCC Rcd at 14280 ¶¶ 313-314.

⁷ *Id.* at 14273, 14280-81 ¶¶ 290, 314-16. As noted *supra* note 4, the MBS is sufficiently large that it can accommodate approximately twice the amount of digitized video programming as most analog systems that use most of the 2500-2690 MHz band.

⁸ By contrast, if the LBS/UBS spectrum is returned, but no auction participant bids for that spectrum and thereby accepts the obligation to fund digitization, the Commission should take that factor into consideration in determining whether to grant a waiver and permit continued operation of the analog MVPD service under the pre-transition bandplan and rules. However, the Commission should balance that factor against the extent of interference that will be caused, the availability of mitigation techniques, the number of MVPD subscribers and the extent to which those subscribers have access to alternative MVPD services.

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Pursuant to Section 1.1206(b)(1), this notice is being filed electronically with the Commission via the Electronic Comment Filing System for inclusion in the public record of the above-reference proceeding. Should you have any questions regarding this presentation, please contact the undersigned.

Respectfully submitted,

/s/ Paul J. Sinderbrand
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